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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1925.

No. [redacted] 115

THE INTEROCEAN OIL COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

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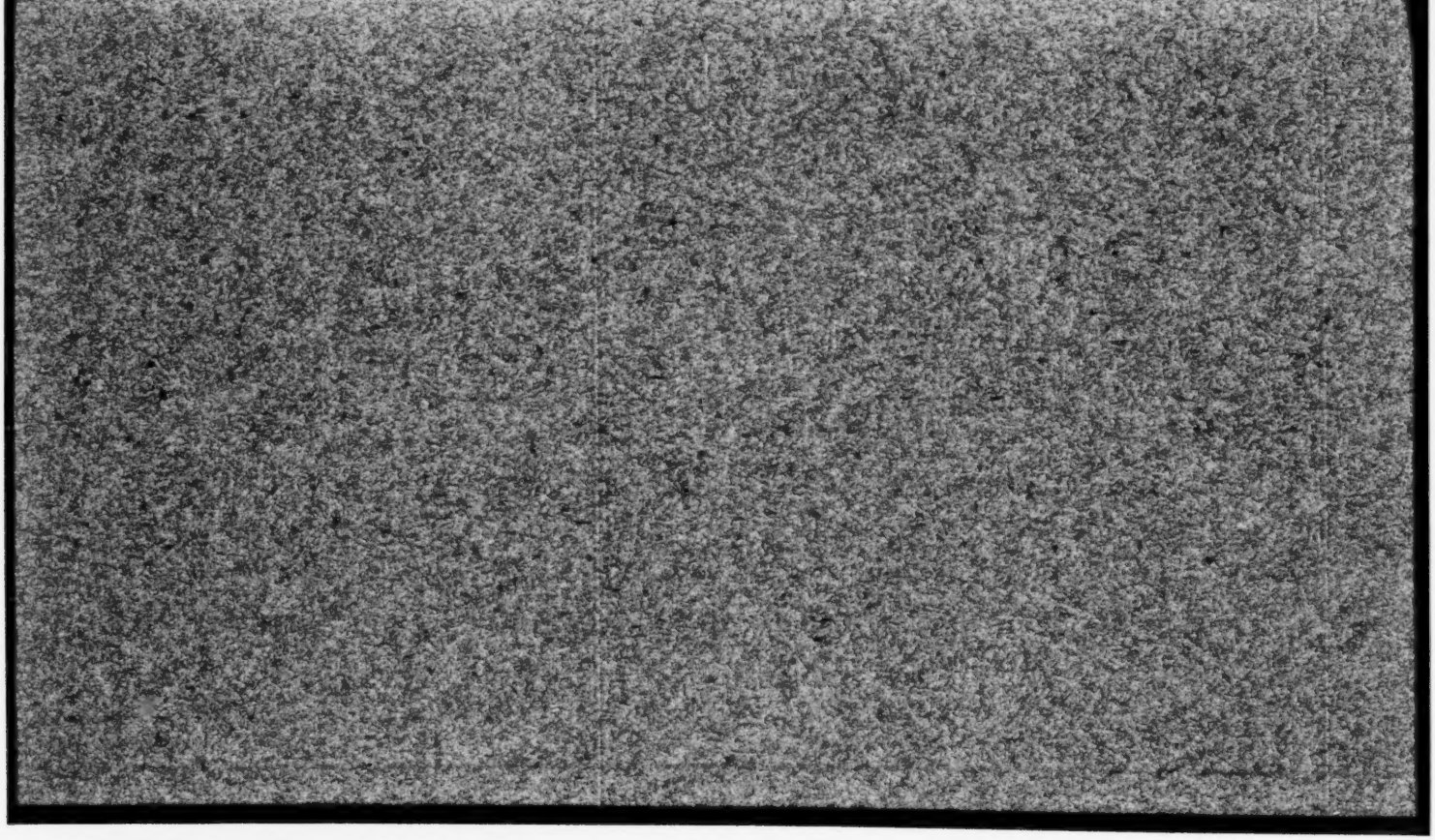
Of Counsel.



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BRIEF FOR APPELLANT.

This is an appeal from a judgment of the Court of Claims dismissing the petition of appellant upon demurrer filed thereto by the United States on the ground that said petition does not state a cause of action against the United States (Record, p. 7).

Statement of Facts.

The appellant, The Interocean Oil Company, is a corporation engaged in refining, transporting, and dealing in petro-

leum and products of petroleum, chiefly fuel oil, at Carteret, N. J., and owned about seventeen (17) acres of land situated on Staten Island Sound, with improvements thereon, consisting of an oil refinery with storage tanks and various appurtenances, of an aggregate value of at least $440,000.00 (Record, p. 1, par. 1).

Appellant also owned an oil refinery at Baltimore, Md., where is was represented by Harold F. Brown, and during January, 1918, and subsequent thereto sold fuel oil to the United States Shipping Board and the United States Navy for the use of the Army transports carrying passengers, supplies, and munitions to our troops in the war with Germany. Arrangements for the sale of the fuel oil were made with Maj. John Hervey Ross, of the Quartermaster Corps of the Army, acting under the orders of Col. Amos W. Kimball, who was in charge of such purchases of fuel oil for the Army transports. Fuel oil suitable and necessary for use by such transports was secured by a combination of the heavy oil of the appellant with the light oil of the Standard Oil Company of New Jersey, the experiments to secure which were made in the laboratories of the appellant, thus obtaining a satisfactory grade of fuel oil (Record, p. 1, par. 2). When this problem was solved, Major Ross ordered said Brown to be prepared to furnish all the fuel oil the Quartermaster Corps might need, and this was done to the limit of the capacity of the Baltimore plant of the appellant.

As all the Army transports operating from Baltimore were fuel-oil burners and needed great quantities of oil, Major Ross demanded additional storage for oil at appellant's plant at Baltimore, as he feared the facilities for this purpose were not sufficient for the oil needed, and he was told by said

Brown that appellant could not purchase material for the erection of additional tanks at Baltimore as the available supplies of the steel plates necessary for the tanks were in demand for other war purposes and were carefully guarded and distributed by the Government. These conversations developed the fact that appellant owned an oil refinery at Carteret, N. J., with tanks there capable of storing over 100,000 barrels of oil, whereupon Major Ross ordered that these tanks at Carteret be dismantled, shipped to Baltimore, and re-erected on the property of the appellant at Baltimore (Record, p. 2, par. 2).

On April 7, 1918, Major Ross, acting under orders of Colonel Kimball, who was in charge of the Quartermaster Corps at Baltimore, Md., went to the offices of the appellant, 90 West Street, New York City, and informed Mr. R. R. Govin, president of the Interocean Oil Company, in the presence of Mr. R. D. Upham, vice-president, and Mr. G W. S. Whitney, an official of the company, that he would have to take the tankage at Carteret and remove it to Baltimore as an exigency of war; that he preferred that the appellant should do this work, but in case of its refusal the property would be commandeered, transported, and re-erected at Baltimore, Md., by the Government. The said officers of the company called Major Ross' attention to the fact that such a transfer would destroy the company's business in New York, and that the plant, if removed from Carteret, could never be re-erected there, but Major Ross assured them that he was acting under competent direction and authority of the War Department, and that all services involved and all expenses incurred and damages suffered by the company would be paid for by the Government, and

that written confirmation of his verbal orders would be forthcoming. Appellant had on many occasions supplied fuel oil on such verbal orders given by Major Ross prior to this time and all his orders had been confirmed in writing and the fuel oil so furnished had been paid for by the Government, thus confirming the authority of Major Ross to act for the War Department. Written confirmation of the order to remove the tanks was never received, although Major Ross assured the officials of the company that he had made out such orders and delivered same to Colonel Kimball for signature and delivery to appellant, but Colonel Kimball shortly thereafter was separated from the service because of ill health and went abroad, where he died without ever having delivered such confirmatory written orders to appellant (Record, pp. 2, 3, 4, pars. 3-7).

Realizing that under the law the Government had the power to commandeer the property and believing from the statement of Major Ross that it would do so, and also believing that all expenses incurred and damages suffered by the appellant would be paid for in accordance with the assurance of Major Ross, appellant began at once to take down its tanks at Carteret and shipped them to Baltimore at an expense to appellant of $53,697.21, but the tanks were not fully re-erected at Baltimore when the armistice of November 11, 1918, rendered their use unnecessary for the purposes of the War Department, and the completion of the work was not accomplished until February, 1919 (Record, p. 4, par. 8).

When appellant undertook to re-establish its plant at Carteret after the close of hostilities, it was unable to do so. The Legislature of the State of New Jersey had, previous

to the removal of the tanks, passed an act (chap. 152, Laws of 1917), which was given effect by the Borough Council of Roosevelt, in which Carteret is situated, prohibiting the re-erection of the plant. Had the plant not been removed, this act would not have applied and the appellant could have occupied and developed its property indefinitely without molestation, as it had gone to Carteret in 1913 and developed its plant with the consent of the municipality. No other adequate site near New York could thereafter be secured for the purpose of an oil refinery and the appellant has lost its franchise as a direct result of the removal of its plant, and has suffered a severe loss in the depreciation of its real estate at Carteret, which was chiefly valuable for an oil refinery (Record, pp. 4, 5, pars. 9-14).

Appellant has been paid nothing and seeks to recover the amount actually expended by it in taking down and transporting the tanks to Baltimore ($53,697.21), and also for the loss of its franchise, depreciation of its real estate, etc., all of which are the direct result of the removal of the plant at the demand of the Government for war purposes (Record, p. 6).

ARGUMENT.

I.

In discussing this case and the theory upon which it is brought, the situation of our country in April, 1918, must be kept in mind. We were in the midst of the greatest war the world has ever known. Two millions of our men were in Europe dependent upon our Government for supplies of all kinds. The National Defense Act approved June 3,

1916, was in full force and effect to secure the efficient prosecution of the war.

The argument upon the demurrer to the petition of appellant in the Court of Claims was placed upon three grounds:

(1) No contract between the United States and appellant.

(2) Major Ross not authorized to direct dismantling of storage tanks at Carteret, N. J., and removal of same to Baltimore.

(3) No contract made in compliance with Section 3744, Revised Statutes.

Discussing the third objection first, viz., that no formal contract was made in compliance with Section 3744, Revised Statutes, our answer is that such contract was not required under the facts and circumstances of this case under repeated decisions of this Court, where, as in this case, there was a partial performance of the contract by the appellant.

Clark *vs.* United States, 95 U. S., 539.

Harvey *vs.* United States, 105 U. S., 671.

United States *vs.* Andrews, 207 U. S., 229.

United States *vs.* New York & Porto Rico Steamship Co., 239 U. S., 88.

In the Clark case, first referred to, Mr. Justice Bradley, in discussing the application of Section 3744, Revised Statutes, to Government contracts, said (p. 542):

> "We do not mean to say that where a parole contract has been wholly or partly executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be permitted to recover such value as upon an implied contract for a *quantum meruit*."

In United States *vs.* Andrews (*supra*), Mr. Chief Justice White said (p. 243):

> "Lastly, it is urged that in any event, the court below (Court of Claims) erred, since the contract in question was not reduced to writing and signed by the contracting parties with their names at the end thereof, as required by Rev. Stat. 3744, U. S. Comp. Stat. 1901, p. 2510. But it is settled that the invalidity of a contract because of a non-compliance with the section referred to is immaterial after the contract has been performed."

The National Defense Act approved June 3, 1916, in Section 9 empowers the Quartermaster Corps to procure all necessary supplies for the successful prosecution of the war, and Section 120 of said act provides that "the President in time of war or when war is imminent is empowered through the head of any Department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any corporation for such product or material as may be required," etc. Compliance with such orders is obligatory. If the order is refused, the property needed may be taken by the Government and failure to comply "shall be deemed a felony and upon conviction punished by imprisonment not more than three (3) years and by a fine not exceeding $50,000." The compensation to be paid by the Government "shall be fair and just."

Passing now to a consideration of the first and second grounds of the demurrer to the appellant's petition in the Court of Claims, viz., that no contract existed between the United States and appellant, and that Major Ross had no authority to direct the dismantling and removal of the tanks,

we respectfully submit that there was a contract, express or implied, which this Court will recognize and enforce. Major Ross stated to appellant that his authority was complete, and that written confirmation to support his demand under the National Defense Act would be furnished the appellant in the case of this order as it had been in the matter of the sale of fuel oil. That Major Ross did have authority from the War Department to purchase oil by verbal orders is conclusively shown by the fact that in each case his verbal order was confirmed by the War Department and the oil furnished by the appellant on such orders was paid for by the Government, thus confirming the authority of Major Ross to give such orders. But that there was an implied promise to indemnify the appellant for all loss and damages suffered by the dismantling and removal of the tanks on the order of an officer of the Government in time of war is beyond question.

In United States *vs.* Russell, 13 Wallace, 623, this Court held that—

The taking of private property by the Government when the emergency of the public service in time of war or impending danger is too urgent to admit of delay, raises an implied promise to indemnify the owner.

In this case (at pp. 627 and 628), Mr. Justice Clifford said:

> "Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized or appropriated to the public use, or may even be destroyed without the consent of the owner. Unques-

tionably such extreme cases may arise, as where property taken is imperatively necessary in time of war to construct defenses for the preservation of a military post at the moment of an impending attack by the enemy, or for food or medicine for a sick and famishing army utterly destitute and without other means of such supplies, or *to transport troops, munitions of war,* or *clothing to reinforce* or *supply an army in a distant field* where the necessity for such reinforcement or supplies is extreme and imperative * * *

"Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right and it is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and when shown, the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the Government is bound to make full compensation to the owner."

In United States *vs.* Great Falls Manufacturing Co. (112 U. S., 645), this court held:

Where property to which the United States asserts no title is taken by its officers or agents pursuant to an act of Congress, as private property for the public use, the Government is under an implied obligation to make just compensation to the owner.

Mr. Justice Harlan delivered the opinion of the Court in this case and said (p. 659):

> "In the present case there was, it is true, no statutory proceedings for the condemnation of the claimant's property rights * * * the Government did not assert title in itself to this property at the time it

> was taken. * * * In such a case, it is difficult to perceive why the legal obligation of the United States to pay for what was thus taken pursuant to an act of Congress is not quite as strong as it would have been had formal proceedings for condemnation been resorted to for that purpose."

II.

We respectfully submit, also, that the provisions of the Fifth Amendment to the Constitution are applicable to the facts in this case.

In Monongahela Navigation Co. *vs.* United States, 148 U. S., 312 (1892), where the Federal Government had condemned for public use certain property of the company, this Court held that the Government must return the exact equivalent for it to the Company.

Mr. Justice Brewer said (p. 325):

> "The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right or power in the Government, the last, the one in point here, being 'Nor shall private property be taken for public use without just compensation.' The noun 'compensation' standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the

> equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of these two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken."

And, again, at page 327, the Court says:

> "The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property through Congress, or the legislature, its representative, to say what compensation shall be paid or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and ascertainment of that is a judicial inquiry."

The Fifth Amendment to the Constitution declares that "private property shall not be taken for public use without just compensation." As a result of this provision the citizen must acquiesce in the power of the Government to take his property for public use whenever the needs of the Nation demand it, and the Government agrees that when the property of the citizen is so taken just compensation shall be made. This constitutes a compact between the citizen and the Government and each party to this compact is bound thereby.

In Boyd *vs.* United States (116 U. S., 616, at p. 635), Mr. Justice Bradley said:

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of

> procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property *should be liberally construed*. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon."

And it is well settled that the existence of a state of war does not suspend the guaranties of the Constitution.

In United States *vs.* Cohen Grocery Co., 255 U. S., at p. 88 (1921), this Court said:

> "We are of opinion that the Court below was clearly right in ruling that the decisions of this Court indisputably established that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon."

Congress established the Court of Claims as a legal tribunal to which the citizen could go to recover compensation for his property so taken by the Government.

Section 145 of the Judicial Code provides:

> "The Court of Claims shall have jurisdiction to hear and determine the following matters: (1) Claims against the United States: First, all claims (except for pensions) founded upon the Constitution of the United States, or any law of Congress, upon any regulation of an Executive Department, upon any contract express or implied, with the

> Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a Court of Law, Equity, or Admiralty, if the United States were suable."
>
> (U. S. Compiled Statutes, 1918 Ed., Sec. 1136.)

The National Defense Act approved June 3, 1916, gives to the Quartermaster Corps, in Sections 9 and 120 thereof, the duty of procuring all necessary supplies for the conduct of the war, and provides that demands made by the Government upon individuals, companies, or corporations must be promptly complied with, and upon a failure to comply the property needed shall be taken by the Government and punishment visited upon those failing to comply. The language of said act on this point is as follows:

> "And any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this Section (120) shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and by a fine not exceeding $50,000."

This Section 120 also provides for compensation which "shall be just and fair."

Under the circumstances of the state of war existing in April, 1918, appellant was fully justified in co-operating with the Government. It was its duty to do so. It realized that if it failed to do so the Government could and would

take its property, as Major Ross said, and a refusal to comply with the Government's orders would subject the officials of the corporation to a criminal prosecution.

In United States *vs.* Lynah, 188 U. S., 445 (1902), this Court said (p. 465):

> "All private property is held subject to the necessities of Government. The right of eminent domain underlies all such rights of property. The Government may take personal or real property whenever its necessities or the exigencies of the occasion demand. So the contention that the Government had a paramount right to appropriate this property may be conceded, but the Constitution in the Fifth Amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised, it shall be attended by compensation."

We respectfully call attention to the fact, also, that to sustain an action against the Government in the Court of Claims for such a taking of private property it is not essential even that the taking should have been in pursuance of an act of Congress.

As this Court says in the Lynah case (*supra*):

> "In United States *vs.* Berden Fire Arms Manufacturing Co., 156 U. S., 552, a judgment of the Court of Claims against the United States on an implied contract for the use of an improvement in breech-loading firearms was sustained *although there was no act of Congress expressly directing the use of such improvements.*" 188 U. S., at p. 464 (1912).

And the fact that no price was fixed or agreed upon is of no moment:

> "That no price was agreed upon, or that the officers of the Government were not authorized to agree upon a price is immaterial. No price was fixed in United States *vs.* Palmer (*supra*) or in United States *vs.* Russell, 80 U. S., —; 13 Wallace, 623. The question is whether there was a contract for the use, and not whether all the conditions of the use were provided for in such contract." U. S. *vs.* Berden Co., 156 U. S., at p. 569 (1894).

The trend of the decisions of this Court is unquestionably in favor of the allowance of just compensation to the citizen for his property taken or used by the Government for a public purpose. In a recent case (U. S. *vs.* Bethlehem Steel Co., 258 U. S., 321 (1922), this Court said, at page 326:

> "There is but one question in the case and that is the attitude of the Ordnance Bureau representing the United States toward the Leibert patent whether in recognition of it, as contended by the Steel Company, or in opposition to, or, it may be said in tortious use of it, as contended by the United States."
>
> "We have in other cases expressed our aversion to the latter conclusion except upon explicit declaration or upon a course of proceedings tantamount to it. A contract, express or implied, in fact must, it is true, be established, but one to pay for a mechanism used will be implied rather than a tortious appropriation of it—rather than the exercise by the United States of its sovereignty in aggression upon the rights of its citizens."

By far the greatest loss to the appellant was the loss of its franchise at Carteret. We have attached to the petition, as an exhibit, the affidavit of Walter V. Quin, borough clerk of Roosevelt, Middlesex County, N. J., in which Carteret is located, which shows that the borough council would not permit the re-establishment of the oil-refining plant on the site it formerly occupied, which was the only property owned there by the appellant (Record, pp. 6 & 7), and that this fact was known to the appellant at the time the Government demanded the removal of the plant to Baltimore.

That a franchise is property has been held by this Court in West River Bridge Co. *vs.* Dix, 6 Howard, 507, in which case Mr. Justice Daniel says, page 534:

> "A franchise is property and nothing more; it is incorporeal property and is so defined by Justice Blackstone * * * It is its character of property only which imparts to it value, and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyment."

Again, in Monongahela Navigation Company *vs.* United States (*supra*), this Court held that the company was entitled, under the provisions of the Fifth Amendment to the Constitution, to recover compensation from the United States for the taking of the franchise to exact tolls as well as for the value of the tangible property taken, and that the assertion by Congress of its purpose to take the property which that company had constructed did not destroy the franchise granted.

The value of a franchise is a question of fact and is capable of being established by competent evidence. The loss of the

franchise of appellant was the direct result of the taking of its property by the Government for war purposes. It is not only the duty of a citizen, but it is a privilege, to help the Government to the limit of his ability in every emergency, and especially such as existed in 1918, but no corporation could afford to do so unless assured of a just compensation for the services rendered or the property taken, because of the fact that the officers of a corporation must protect the interest of its stockholders, to whom they bear the relation of trustees, and to do otherwise would be a violation of their trust. And it is respectfully submitted that a policy of helpful co-operation from its citizens at all times is fostered by a liberal attitude on the part of the Government toward the citizens who have tried to help the Government in an emergency, where property of the citizen, to which the Government claims no title, has been taken for public use.

The judgment of the Court of Claims should be reversed.

Respectfully submitted,

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